

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 22, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAY-T H.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:20-CV-05051-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 12, 14. Attorney Chad Hatfield represents Jay-T H. (Plaintiff); Special Assistant United States Attorney Jeffrey Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income on November 23, 2016, alleging disability beginning April 13, 2016 due to back problems and a left leg injury. Tr. 75. The application was denied initially and upon reconsideration. Tr. 99-102, 106-08. Administrative Law Judge (ALJ) Jesse Shumway held a hearing on November 27, 2018, Tr. 39-61, and issued an unfavorable decision on December 26, 2018, Tr. 22-31. Plaintiff requested review by the Appeals Council and the Appeals Council denied the request on January 15, 2020. Tr. 1-5. The ALJ's December 2018 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on March 17, 2020. ECF No. 1.

STATEMENT OF FACTS

Plaintiff was born in 1987 and was 28 years old as of alleged onset date. Tr. 75. He has an 11th grade education and a limited work history consisting of agricultural and warehouse laboring. Tr. 177, 198.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one

1 rational interpretation, the Court may not substitute its judgment for that of the
 2 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
 3 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
 4 administrative findings, or if conflicting evidence supports a finding of either
 5 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
 6 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
 7 supported by substantial evidence will be set aside if the proper legal standards
 8 were not applied in weighing the evidence and making the decision. *Browner v.*
 9 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

10 SEQUENTIAL EVALUATION PROCESS

11 The Commissioner has established a five-step sequential evaluation process
 12 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
 13 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 14 proof rests upon the claimant to establish a prima facie case of entitlement to
 15 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
 16 claimant establishes that a physical or mental impairment prevents the claimant
 17 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant
 18 cannot perform past relevant work, the ALJ proceeds to step five, and the burden
 19 shifts to the Commissioner to show (1) the claimant can make an adjustment to
 20 other work; and (2) the claimant can perform specific jobs that exist in the national
 21 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir.
 22 2004). If a claimant cannot make an adjustment to other work in the national
 23 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

24 “A finding of ‘disabled’ under the five-step inquiry does not automatically
 25 qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
 26 Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).
 27 When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must
 28 determine whether the drug or alcohol addiction is a material factor contributing to

1 the disability. 20 C.F.R. § 416.935(a). In order to determine whether DAA is a
 2 material factor contributing to the disability, the ALJ must evaluate which of the
 3 current physical and mental limitations would remain if the claimant stopped using
 4 drugs or alcohol, then determine whether any or all of the remaining limitations
 5 would be disabling. 20 C.F.R. § 416.935(b)(2). If the remaining limitations would
 6 not be disabling, DAA is a material contributing factor to the determination of
 7 disability. *Id.* If the remaining limitations would be disabling, the claimant is
 8 disabled independent of the DAA and the addiction is not a material contributing
 9 factor to disability. *Id.* Plaintiff has the burden of showing that DAA is not a
 10 material contributing factor to disability. *See Parra*, 481 F.3d at 748.

11 ADMINISTRATIVE FINDINGS

12 On December 26, 2018, the ALJ issued a decision finding Plaintiff was not
 13 disabled as defined in the Social Security Act.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 15 activity since the application date. Tr. 24.

16 At step two, the ALJ determined Plaintiff had the following severe
 17 impairments: lumbar degenerative disc disease, hepatosplenomegaly, anemia,
 18 alcohol use disorder, and alcohol induced pancreatitis. *Id.*

19 At step three, the ALJ found Plaintiff did not have an impairment or
 20 combination of impairments that met or medically equaled the severity of one of
 21 the listed impairments. Tr. 25.

22 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
 23 he could perform light exertional work, except "he cannot climb ladders, ropes, or
 24 scaffolds, and can only occasionally perform all other postural activities; and he
 25 would miss at least 1-2 days of work per month." *Id.*

26 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 26.

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1 At step five, the ALJ determined that, considering Plaintiff's age, education,
2 work experience, and RFC, there were no jobs that existed in significant numbers
3 in the national economy that Plaintiff was capable of performing. Tr. 26-27.

4 Because of the presence of substance use, the ALJ further considered
5 Plaintiff's abilities were he to stop drinking alcohol. The ALJ found Plaintiff's
6 remaining impairment would continue to be severe, but would not meet or
7 medically equal a listing. Tr. 27-28.

8 The ALJ found, if Plaintiff stopped the substance abuse, he would retain the
9 same physical capabilities. Tr. 28.

10 The ALJ again found Plaintiff had no past relevant work. Tr. 30.

11 The ALJ finally found that, considering Plaintiff's age, education, work
12 experience, and residual functional capacity if he stopped using alcohol, there
13 would be jobs that existed in significant numbers in the national economy that he
14 would be capable of performing, specifically identifying the representative
15 occupations of housekeeping cleaner, fast food worker, and small parts assembler.
16 *Id.*

17 The ALJ thus concluded Plaintiff's substance use disorder was a
18 contributing factor material to the determination of disability, and thus Plaintiff
19 was not under a disability within the meaning of the Social Security Act at any
20 time from the date the application was filed through the date of the decision. Tr.
21 30.

22 ISSUES

23 The question presented is whether substantial evidence supports the ALJ's
24 decision denying benefits and, if so, whether that decision is based on proper legal
25 standards.

26 Plaintiff contends the ALJ erred by (1) omitting evidence from Plaintiff's
27 primary care provider; (2) failing to adequately evaluate Plaintiff's residual
28 functional capacity in the absence of alcohol use; (3) improperly evaluating the

1 medical opinion evidence; (4) improperly rejecting Plaintiff's subjective
 2 complaints; and (5) conducting an improper analysis at step five.

3 **DISCUSSION**

4 **1. Medical opinion evidence**

5 Plaintiff argues the ALJ erred in weighing the opinion evidence, by
 6 improperly rejecting the opinion from Plaintiff's treating provider, Dennen Frazier,
 7 PA-C, and giving undue weight to the medical expert at the hearing, Dr.
 8 Subramaniam Krishnamurthi. ECF No. 12 at 15-17.

9 In determining the persuasive weight of an opinion, the ALJ should consider
 10 the nature of the relationship, the supportability and consistency of the opinion,
 11 any specialization of the source, and other factors, such as the understanding of the
 12 disability programs and the source's familiarity with the case record. 20 C.F.R. §§
 13 416.927(c), 416.927(f). The Commissioner may reject the opinion of a non-
 14 examining physician by reference to specific evidence in the medical record. *Sousa*
 15 *v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998). An ALJ may discount the
 16 opinion of an "other source," such as a physician's assistant, if they provide
 17 "reasons germane to each witness for doing so." *Molina v. Astrue*, 674 F.3d 1104,
 18 1111 (9th Cir. 2012).

19 *a. Dennen Frazier, PA-C*

20 Plaintiff asserts the ALJ erred by improperly rejecting the opinion from his
 21 treating provider, Mr. Frazier, PA-C. ECF No. 12 at 15-17.

22 In October 2018, Plaintiff's primary care provider, Mr. Frazier, completed a
 23 medical source statement. Tr. 420-21. He noted Plaintiff's conditions included
 24 chronic left knee pain, closed fracture of the left tibial plateau, and chronic low
 25 back pain without sciatica. Tr. 420. He opined Plaintiff needed to lie down during
 26 the day once or twice per week for 30 minutes due to pain, and would be likely to
 27 miss one day of work per month and be off-task 12-20% of the time if he were
 28 attempting to work full-time. Tr. 420-21. Mr. Frazier further stated that full-time

1 work would be likely to cause Plaintiff's condition to deteriorate, as his low back
2 pain would likely continue and worsen without intervention and that he was likely
3 to develop arthritis in his knee at a faster than normal rate due to the fracture. Tr.
4 421.

5 The ALJ gave this opinion little weight, finding it contained little
6 meaningful explanation and finding what narrative explanation was offered was
7 not persuasive in light of unremarkable imaging of the spine and knees. Tr. 29. The
8 ALJ further found the opinion to be inconsistent with the longitudinal medical
9 evidence and Plaintiff's own reported activity level. *Id.*

10 Plaintiff argues the ALJ failed to offer any analysis of the record and did not
11 cite any inconsistency or explain how Mr. Frazier's opinion was inadequate or
12 inconsistent with Plaintiff's activity level. ECF No. 12 at 16. He argues the record
13 contains imaging and objective findings supporting the disabling limits noted by
14 Mr. Frazier. *Id.* at 16-17. Defendant argues the ALJ legitimately considered the
15 quality of the explanation in light of the minimal objective findings, and
16 reasonably considered the opinion's consistency with the record as a whole. ECF
17 No. 14 at 6-7.

18 The Court finds the ALJ did not err. An ALJ may consider the supportability
19 and consistency of an opinion in assessing its persuasiveness. 20 C.F.R. §§
20 416.927(c)(3)-(4), 416.927(f). The ALJ reasonably concluded that Mr. Frazier's
21 opinion was lacking in meaningful explanation for the basis of the limits and was
22 inconsistent with the unremarkable imaging and the longitudinal record
23 demonstrating generally normal findings on exam. The ALJ's analysis reaches the
24 germane standard for a non-acceptable source.

25 *b. Dr. Subramaniam Krishnamurthi, MD*

26 Medical expert Subramaniam Krishnamurthi reviewed Plaintiff's treatment
27 records and testified at the hearing. Tr. 44-51. He opined Plaintiff's episodes of
28 pancreatitis were from his alcoholism and would resolve if he stopped drinking. Tr.

1 45-47. He testified that, absent alcohol use, Plaintiff's only severe impairment
2 would be his lumbar condition, which would limit him to performing light work
3 with some postural limitations. Tr. 48-50.

4 The ALJ gave Dr. Krishnamurthi's testimony great weight, noting his
5 qualifications, his review of the entire records, reasonable explanations, specialized
6 program knowledge, and that he was available for cross examination. Tr. 26, 29.

7 Plaintiff argues the ALJ gave undue weight to this testimony, as it was not
8 consistent with the medical evidence showing no detectable alcohol levels on at
9 least ten of Plaintiff's hospitalizations for pancreatitis. ECF No. 12 at 17.

10 Defendant argues the record reflects Plaintiff continued to drink and that he often
11 presented with alcohol-withdrawal symptoms, and that Plaintiff has not
12 demonstrated Dr. Krishnamurthi's testimony was contradicted by all other
13 evidence in the record. ECF No. 14 at 5-6.

14 The Court finds the ALJ did not err. Dr. Krishnamurthi explained his
15 opinion that Plaintiff's pancreatitis was caused by his alcoholism and would
16 improve if he were to stop drinking. Tr. 45-47. Plaintiff offers no medical basis for
17 his theory that undetectable levels of alcohol at the time of hospitalization indicates
18 otherwise, or his implication that alcohol-induced pancreatitis does not occur
19 without active intoxication. Doctors repeatedly encouraged complete abstinence in
20 order to prevent future complications. Tr. 611, 689. Plaintiff testified at the hearing
21 that he did not have any periods of sobriety longer than two months. Tr. 43-44, 52-
22 53. The ALJ reasonably relied on the medical expert's testimony. *See also* Social
23 Security Ruling 13-2p (noting some physical conditions are expected to improve
24 with abstinence and allowing an ALJ to rely on the opinion of an acceptable
25 medical source in so finding, even without a period of abstinence).

26 **2. Plaintiff's subjective complaints**

27 Plaintiff alleges the ALJ erred in rejecting his symptom testimony without
28 providing adequate reasons. ECF No. 12 at 17-20.

1 It is the province of the ALJ to make determinations regarding a claimant's
2 subjective complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
3 However, the ALJ's findings must be supported by specific cogent reasons.
4 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative
5 evidence of malingering, the ALJ's reasons for rejecting a claimant's testimony
6 must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281
7 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

8 The ALJ found Plaintiff's medically determinable impairments could
9 reasonably be expected to cause few of the alleged symptoms in the absence of
10 substance use; he found Plaintiff's statements concerning the intensity, persistence
11 and limiting effects of his symptoms were not entirely consistent with the objective
12 medical evidence and other evidence in the record. Tr. 28. Specifically, the ALJ
13 found Plaintiff's allegations to be undermined by the limited objective findings,
14 adequate pain management, Plaintiff's past reports, his lack of work history, and
15 his generally robust daily activity level. Tr. 28-29.

16 Plaintiff argues the medical record shows his acute pancreatitis episodes
17 occurred even when he was not drinking, thus undermining the ALJ's conclusions
18 regarding the materiality of alcohol. ECF No. 12 at 18. He further asserts that the
19 remainder of the ALJ's rationale was insufficient, as the ALJ failed to identify any
20 specific inconsistencies, made unspecified allegations about Plaintiff's limited
21 work history, and failed to explain how any of the identified daily activities were
22 inconsistent with Plaintiff's allegations. *Id.* at 19-20. Finally, Plaintiff argues that
23 his intermittent pain from pancreatitis flares and his various musculoskeletal issues
24 would result in absenteeism, excessive breaks, and off-task behavior above the
25 limits that would allow him to remain employable. *Id.* at 20. Defendant argues the
26 ALJ reasonably considered the type and effectiveness of Plaintiff's treatments, his
27 activities, and his extremely poor work history in finding his allegations
28 unsupported. ECF No. 14 at 3-4.

1 The Court finds the ALJ offered clear and convincing reasons for
2 discounting Plaintiff's claim of disabling impairments in the absence of alcohol
3 use. As discussed above, the ALJ's finding that Plaintiff's functioning would
4 improve with sobriety was supported by substantial evidence. The ALJ's rationale
5 regarding Plaintiff's remaining conditions is supported by substantial evidence.

6 The ALJ found Plaintiff's musculoskeletal pain was treated with over-the-
7 counter medications. Tr. 29. An ALJ may reasonably consider the type and
8 effectiveness of treatments. Social Security Ruling 16-3p. An ALJ may also
9 consider a claimant's poor work history in finding allegations of disability to be
10 unsupported. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (An ALJ's
11 finding that the claimant had limited work history and "ha[d] shown little
12 propensity to work in her lifetime" was a specific, clear, and convincing reason for
13 discounting the claimant's testimony.). Plaintiff's earnings record indicates he has
14 never earned at the substantial gainful level. Tr. 177. Though it cannot serve as the
15 sole basis for discounting a claimant's subjective reports, the objective medical
16 evidence is a "relevant factor in determining the severity of the claimant's pain and
17 its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The
18 ALJ noted the mild imaging and largely normal findings on exam. Tr. 29. The ALJ
19 therefore offered sufficient clear and convincing reasons for discounting Plaintiff's
20 claim of disabling limitations in the absence of substance abuse.

21 **3. Unexhibited evidence**

22 On November 14, 2018, Plaintiff's treating provider, Mr. Dennen Frazier,
23 PA-C, completed a letter summarizing Plaintiff's multiple hospitalizations for
24 pancreatitis, and opining he had likely sustained permanent damage to his pancreas
25 and was very likely to have further episodes of acute pancreatitis in the future. ECF
26 No. 13-1. According to Plaintiff's counsel's declaration, this letter was submitted
27 to the electronic file, but was not included in the final record. ECF No. 13 at 2. The
28 letter does not appear in the certified record.

1 Plaintiff argues the ALJ failed to fulfil his duty to develop the record by not
2 admitting the letter into the record, and thus denied Plaintiff due process. ECF No.
3 12 at 11-13. He asserts this error was harmful as Mr. Frazier’s letter established
4 disabling flares of pancreatitis regardless of whether Plaintiff abstains from alcohol
5 use or not. *Id.* at 12.

6 Defendant argues Plaintiff was not denied due process, as he had the
7 opportunity to submit evidence and be heard, and that since the record was
8 submitted, there was no further evidence for the ALJ to develop. ECF No. 14 at 7-
9 8. Defendant characterizes the omission of the letter from the record as a “technical
10 hiccup” or “a glitch in the usual process of evidence management,” and asserts any
11 error was harmless at most, as the letter does not undermine the substantial
12 evidence upon which the ALJ relied. *Id.* at 9-10.

13 The Court finds that any error on the part of the ALJ in failing to exhibit Mr.
14 Frazier’s letter was harmless. *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
15 2008) (an error is harmless when “it is clear from the record that the . . . error was
16 inconsequential to the ultimate nondisability determination”). The letter notes
17 Plaintiff’s multiple hospitalizations for pancreatitis, which are well-documented in
18 the record. The remainder of the letter does not establish any functional limits or
19 quantify the likelihood of future episodes of pancreatitis. ECF No. 13-1. Despite
20 Plaintiff’s allegation, the letter does not establish that Plaintiff would continue to
21 have a disabling rate of pancreatitis flares regardless of his alcohol consumption.
22 *Id.* It states only that Plaintiff is likely to have further episodes and does not
23 comment on what his status would be if he stopped drinking. *Id.* Because the letter
24 does not speak to any facts not already addressed in the record, the Court finds its
25 exclusion from the record to be harmless error.

26 **4. Other errors**

27 Plaintiff argues that the ALJ improperly assessed Plaintiff’s residual
28 functional capacity in the absence of alcohol, and that the step five findings are

insufficient, as the hypothetical posed to the vocational expert failed to account for all of Plaintiff's limitations. ECF No. 12 at 13-15, 20-21. These arguments are based on successfully showing that the ALJ erred in his treatment of the evidence. *Id.* Because the Court finds that the ALJ did not harmfully err in his evaluation of Plaintiff's symptom statements and the medical opinion evidence, Plaintiff's arguments are without merit.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court finds the ALJ's decision is supported by substantial evidence and free of legal error.

Therefore, **IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

IT IS SO ORDERED.

DATED February 22, 2021.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE